

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

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U.S. DISTRICT COURT  
N.D. OF ALABAMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

ERIC ROBERT RUDOLPH,  
Defendant.

CR-00-~~N~~-0422-S  
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**APPLICATION FOR REVIEW AND APPEAL  
OF MAGISTRATE JUDGE'S ORDER OF SEPTEMBER 14, 2004  
DENYING THE DEFENDANT'S MOTION FOR DISCOVERY OF  
MATERIALS RELATED TO THE SCIENTIFIC TESTING  
OF ATLANTA BOMBING EVIDENCE**

COMES NOW the defendant Eric Robert Rudolph, by and through his undersigned counsel of record, and hereby applies for a review of and appeals from the Magistrate Judge's Order of September 14, 2004, denying in part defendant's *Motion For Discovery of Lab Bench Notes and Other Items Crucial to a Fair Assessment of the Government's Scientific Evidence* (Doc. 181). This application for review and appeal is made pursuant to U.S.C. Title 28 § 636. Relief is due defendant pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, *Brady/Giglio* and their progeny, and Federal Rule of Criminal Procedure 16(a)(1). As grounds for application and appeal defendant states as follows :

The Magistrate Judge's Order of September 14, 2004 (Doc. 322, hereinafter, "Magistrate's Order") denying in part defendant's *Motion For Discovery of Lab Bench Notes and Other Items Crucial to a Fair Assessment of the Government's Scientific Evidence* (Doc. 181, hereinafter, "Defendant's Motion") is clearly erroneous and/or contrary to law for the following reasons:

- 1) The Magistrate's Order incorrectly interprets Rule 16 and *Brady*; and,
- 2) The Magistrate's Order ignores the substantial showing of materiality made in

- 2) The Magistrate's Order ignores the substantial showing of materiality made in support of the discovery request.

For these reasons, defendant moves this Honorable Court to grant the relief requested in Defendant's Motion.

**I. The Magistrate's Order Incorrectly Interprets Rule 16 and Brady**

In Defendant's *Motion* and at the hearing of the motion on May 18, 2004, defendant argued that Federal Rules of Criminal Procedure 16(a)(1)(E), 16(a)(1)(F), and 16(a)(1)(G), as well as *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), Fed.R.Crim.P. 16(a)(1)(E) required the production of 14 categories of scientific evidence relating to the Birmingham charges and to the three Atlanta bombings charged against defendant in Georgia. Defendant asserted that such discovery is material to the preparation of the defense to the Birmingham charges.

At the hearing of the motion on May 18, 2004, "the government agree[d] to produce most of the requested material" as it relates to the Birmingham bombing, but was granted permission to submit a brief "relating to whether the scope of discovery ... properly includes scientific and forensic testing in connection with the Birmingham bombing only, or also includes such testing performed with respect to arguably related Atlanta bombings." (Discovery Order No. 1, Doc. 225). The government subsequently filed a *Memorandum in Opposition to Rudolph's Request For Discovery of Materials Related to The Scientific Testing of Atlanta Bombing Evidence* (Doc. 229) in which it argued that defendant should be denied access to the requested Atlanta material because no showing of materiality had been made, and "[t]he United States does not intend to introduce any evidence relating to the Atlanta bombings during its case-in-chief or during the penalty phase of the Birmingham trial." (Doc. 229 at 3) Defendant's *Reply to United States' Memorandum in Opposition to Rudolph's Request for Discovery of Materials Related to the*

*Scientific Testing of Atlanta Bombing Evidence* (Doc. 243, hereinafter “Defendant’s Reply”) specifically sets forth three justifications in support of the discovery request. The Magistrate’s Order rejects two of those justifications and does not address the third.

In addressing the issue of materiality, the Magistrate’s Order cites *United States v. Ross*, 511 F. 2d 757, 762-63 (5th Cir.), *cert. denied*, 423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 543 (1975) and *United States v. Buckley*, 586 F. 2d 498 (5<sup>th</sup> Cir. 1978), *cert denied*, 440 U. S. 982, 99 S. Ct. 1792, 60 L. Ed. 2d 242 (1979) for the proposition that “[t]here must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.” (Doc. 322, Magistrate’s Order at 3) At the same time, the Order acknowledges a more lenient standard of materiality set forth in the more recent decision in *United States v. Jordan*, 316 F. 3d 1215, 1250-51 (11<sup>th</sup> Cir. ), *cert denied*, \_\_\_U.S.\_\_\_, 124 S. Ct. 133, 157 L. Ed. 2d 40 (2003): “The defendant must make a specific request for the item together with an explanation of how it will be ‘helpful to the defense.’ *See, e.g., United States v. Marshall*, 132 F. 3d 63, 67-68 (D.C. Cir. 1998(‘helpful’ means relevant to preparation of the defense and not necessarily exculpatory))” (Magistrate’s Order at p. 3).

Without attempting to reconcile these two obviously different standards, the magistrate simply opts for the more stringent *Ross/Buckley* language, finding that “[w]hile the evidence from the Atlanta bombings may bear “some abstract logical relationship to the issues in the case, it would not ‘significantly ... alter the quantum of proof in his favor’ in this case.” (Doc. 322, Magistrate’s Order at p. 4)

The magistrate erred in adopting the more stringent *Ross/Buckley* language which is appropriate in a post-conviction context but not in a pretrial setting. As pointed out in Defendant’s Motion and Reply, there is a lowered standard of materiality for the preliminary showing of materiality that must be met in a pre-trial application under *Brady* or pursuant to Rule 16. *United*

*States v. Griffin*, 659 F.2d 932, 939, n.7 (9th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); *United States v. Ramos*, 27 F.3d 65, 71 (3rd Cir. 1994); *see also*, *United States v. Liquid Sugars*, 158 F.R.D. 446, 472 -473 (E.D. Cal 1994); *United States v. Siegfried*, 2000 U.S. Dist. LEXIS 10411, 4 (N.D. Ill. 2000). Indeed, The Eleventh Circuit itself recognized such a lower standard when it stated in *Jordan* that “the defendant must make a specific request for the items together with an explanation of how it will be ‘helpful to the defense.’” *Jordan*, 316 F.3d at 1250. As will be seen, the defense has made such a showing.

## **II. The Magistrate's Order Ignores The Substantial Showing of Materiality Made in Support of the Discovery Request.**

As indicated above, in his *Reply*, Mr. Rudolph set forth three specific justifications for why the requested information would be helpful to the defense, regardless of whether the government chooses to introduce the Atlantic bombing evidence in its case-in- chief.

First, it was pointed out that the government had in fact filed an unsealed indictment charging Mr. Rudolph with the Atlanta offenses, and, that both before and after these charges were filed, government officials had engaged in a relentless media campaign to let the world know its view that Mr. Rudolph is guilty of those charges as well as the Birmingham offenses. As was documented in the *Reply*, government officials, including the Attorney General and other high governmental officials, have repeatedly expressed the view in press conferences and other very public forums that Eric Rudolph is guilty of the Atlanta offenses.<sup>1</sup>

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<sup>1</sup> See e.g., *Is Witness Tied To Atlanta*, Birmingham Post Herald, February 6, 1998, page 01-A (“I am sure that the Atlanta Bombing Task Force is looking into all of the possible connections between their case and Birmingham, said Bill King, spokesman for the Atlanta Office of the U.S. Bureau of Alcohol, Tobacco, and Firearms. ‘That will probably include checking to see if Rudolph matches any of the people they are looking for’, he said. Craig Dahle, spokesman for the Birmingham office of the FBI said he had not compared the pictures but that certainly someone involved in the case had. ‘I’m sure that all of that is being looked at,’ he said. ‘Others have probably made the observation that Rudolph looks like one or more of those composites.’”); *Experts See Links In Attacks*, Birmingham Post Herald, February 16, 1998, page (continued...)

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<sup>1</sup>(...continued)

01-A (" [A]uthorities have said all three Atlanta bombings appeared to be connected."); *FBI Agents Search for Rudolph In Caves*, Birmingham Post Herald, February 19, 1998, page 01-B ("Brian Lett, a spokesmen for the U.S. Bureau of Alcohol, Tobacco, and Firearms in Birmingham said Wednesday that ' Eric's involvement is based on facts, evidence and eyewitness accounts.' ... Investigators have said there are similarities between the Georgia and Alabama cases, but they have not established a definite link."); *Nails in Rudolph Shed Linked to Atlanta Bomb*, Birmingham News, February 26, 1998, page: 01-A ("Laboratory tests have linked the suspect in the bombing of a Birmingham abortion clinic and nails used in the 1997 bombing of an Atlanta women's clinic, a source close to the investigation said Wednesday. The source, speaking on condition of anonymity, said a lab analysis concluded the 1 1/2-inch cut flooring nails used as shrapnel in the Atlanta bomb came from the same batch as a small number of nails found in a storage shed rented by Eric Robert Rudolph in North Carolina. This kind of nail is cut by a machine, leaving unique tool marks, the source said. He compared the machine's marks to those left on a bullet when it's fired from a gun."); *Agents Probing If Rudolph Was With Protester*, Birmingham Post Herald, February 28, 1998, page 01-A ("On Friday, a report in *The New York Times* linked Rudolph to steel plates used in bombs at the 1996 Olympics and at an Atlanta abortion clinic in 1997. The plates in the Atlanta bombs were cut from steel found at a metal-working plant in Franklin, N.C., that employed a friend of Rudolph, according to unidentified federal officials who spoke to the *Times*."); *Toppled Plant Baited Abortion Clinic Bomb*, Birmingham News, March 8, 1998, page: 01-A ("Joseph Lewis, special agent in charge of the Birmingham FBI office ... said the criminal complaint against Rudolph wouldn't have been issued without sufficient evidence, but investigators still have a 'long way to go' in their work. " A lot remains unanswered, but we're feeling pretty good about the case. Is it dead-bang, 100 percent, no doubts? No,' he said. 'But this is as close as you can get.' ... Lewis said there are similarities between the Birmingham bombing and bombings in Atlanta."); *Officials Approve of Combined Task Force*, Birmingham Post Herald, March 19, 1998, page 01-D (" Doug Jones, U.S. Attorney in Birmingham, said Wednesday that the investigation will look into possible links between Eric Robert Rudolph, the only named suspect in the Birmingham bombing, and two Atlanta bombings. 'Our investigation has settled down,' Jones said. It was obviously very intense...'....Laboratory analysis shows that one and a half inch flooring nails used in the clinic bombings in Birmingham and Atlanta came from the same batch as nails found in the storage shed rented by Rudolph, a federal agent said. The batch of nails ' was produced and sold in a small area,' the agent said."); *\$1 Million for Rudolph FBI Plans to Boost Reward, Add Bombing Suspect to Most-Wanted List*, Birmingham News, April 30, 1998, p 01-A (" Links between Rudolph and the Atlanta bombings so far could be merely coincidences, said a senior agent on the case, who requested anonymity. 'But in this business if you can pile up enough coincidences, sometimes you get somewhere,' the agent said. ... Agents hypothesize that the same person or people were behind all three Atlanta attacks. The Olympic and Atlanta abortion clinic bombs had 1/8-inch thick steel plates, designed to direct the blasts. These plates were long ago found to have the same general formulation of steel, the agent said. Some of the manufacturers who make that type of steel sold it in the Southeastern states, including to a metalworking plant in Franklin, N.C., where an associate of Rudolph's worked, the agent added. Another federal agent said lab analysis showed that 1 1/2-inch flooring nails used in the bombs in Birmingham and at the Atlanta abortion clinic came from the same batch as nails found in a storage shed rented by Rudolph.

(continued...)

As was also documented in the Reply, the effect of this concerted media campaign has been devastating to Eric Rudolph's chance for a fair trial anywhere in Alabama and perhaps even in other parts of the United States . The *Reply* cited a nationwide poll of 900 registered voters who were asked in June 2003, "Based on what you know right now, do you think Eric Rudolph

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<sup>1</sup>(...continued)

The batch of nails 'was produced and sold in a small area,' this agent said."); *Lyons Hopes Reward Works*, Birmingham Post Herald, August 6, 1998, page 01-D ("Some similarities in the (Atlanta) bombings indicate the possibility that the crimes are related,' FBI Director Louis Freeh said in Washington. ... Officials stopped short of calling Rudolph a suspect in the Atlanta cases because there is not enough evidence to charge him with those attacks. ... Nevertheless, Freeh said he saw 'a significant linkage' between the Birmingham and Atlanta cases."); *Atlanta Bombing Links Reported*, Birmingham Post Herald, September 16, 1998, page 01-D ("Federal investigators have found more evidence linking abortion clinic bombing suspect Eric Rudolph to three bombings in Atlanta, an FBI spokesman said. Woody Enderson, agent in charge of the Southeast Bomb Task Force, said investigators have developed additional evidence connecting Rudolph to the Atlanta attacks, but he declined to elaborate."); *Rudolph Is Olympics Suspect*, Birmingham Post Herald, October 14, 1998, page 01-B ("The complaint was to be filed as soon as Justice Department officials were able to schedule a news conference to announce it, perhaps as early as today, according to these officials, who requested anonymity. The decision to bring charges came now because 'we have the evidence to support it,' a senior federal law enforcement official said Tuesday. ... [I]nvestigators have assembled 'all kinds of pieces' linking Rudolph to the Atlanta blasts, one investigator said Tuesday."); *Officials Seek Help In Capturing Rudolph*, Birmingham Post Herald, October 15, 1998, page 01-F ("Accompanying [Attorney General] Reno, FBI Director Louis Freeh said the new charges were filed because agents have assembled 'a very strong and substantial case against Mr Rudolph with respect to the Olympic bombing' and the other Atlanta attacks." *Rudolph Trial Here- Ashcroft: 'Best Opportunity in Birmingham*, Birmingham Post Herald, June 2, 2003, page 01-A ("Ashcroft said the legal maneuver - of trying Rudolph for a single bombing case in Alabama before trying him in three other bombing cases in Georgia - will 'provide the best opportunity to bring justice to all of the victims of the bombings and to each community that experienced these attacks. Ashcroft predicted that Rudolph's first trial in the Northern District of Alabama will be 'relatively short and straightforward.'")

was involved in the Atlanta Olympic Park and other bombings he's charged with committing? Is that definitely (involved/not involved) or probably (involved/not involved)?"<sup>2</sup> Thirty three percent of the respondents thought Mr. Rudolph was "definitely involved" and another 29% of the respondents thought he was "probably involved." Significantly, the poll found that "[T]hose living in the South Atlantic region of the country, which includes Georgia, the site of the Olympic bombing, as well as North Carolina where Rudolph was discovered, are the most likely to believe he was involved (74 %)."

It was argued that under these circumstances, the defense could not sit by idly and allow the government to take advantage of a government-created presumption of guilt which would cast its dark shadow over his trial for the Birmingham offenses regardless of whether the government now wishes to belatedly banish the word "Atlanta" from the formal vocabulary of his trial. The *Reply* pointed out that in *Marshall v. United States*, 360 U.S. 310, 312-313, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), the Supreme Court, in the exercise of its supervisory powers, granted a new trial to a defendant when news accounts of defendant's criminal record reached some of the jurors. The trial judge had found such evidence inadmissible, and the United States Supreme Court stated:

"The prejudice to defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecutions evidence. ... It may indeed be greater for it is then not tempered by protected procedures. In the exercise of our supervisory powers to apply proper standards for enforcement of the criminal laws in the Federal courts, ... we think a new trial should be granted."

The *Reply* argued that if, as the defense suspects, the scientific evidence trying Mr. Rudolph to the Atlanta offenses is flawed, the defense needed to know that information pretrial so that it could decide whether to affirmatively use that evidence in the guilt or penalty phase of

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<sup>2</sup> <http://www.foxnews.com/story/0,2933,88944,00.html>. The poll was conducted for Fox News by Opinion Dynamics Corporation.

the Birmingham case to establish Mr. Rudolph's innocence and to erase the false accusation already well rooted by the government in the public mind before the trial has even begun. As the *Reply* put it, "[t]he government has gone down the path of alleging that the Birmingham and Atlanta offenses were all committed by the same person, namely Eric Rudolph. To the extent that the defense can show that the scientific evidence allegedly tying him to any one of the offenses is flawed and in fact points to someone else, a reasonable doubt will be created for the Birmingham offenses. Because the Atlanta offenses are therefore very much at issue for the defense the underlying lab data is highly material for all of the reasons stated in defendant's discovery motion."

The magistrate rejected this first justification on two grounds. First, as to the need to erase the false accusation already imbedded by the government in the public mind, the magistrate reasoned that "the issue whether the government has prejudiced the potential jury pool against the defendant is a question to be resolved in voir dire", and that "it seems unlikely the defendant would risk raising such accusations simply to refute some perceived juror prejudice, particularly if the jury-selection process successfully seats an unbiased jury." (Doc. 322, Magistrate's Order at 5). The flaw in this analysis is that defendant never claimed that he was seeking the information "simply to refute some perceived juror prejudice," but rather, specifically alleged that he needed the discovery so that he could decide whether to affirmatively use the information in the guilt or penalty phase of the Birmingham case to establish his innocence of the Birmingham offenses.

Moreover, given the high level of public awareness of Mr. Rudolph's alleged connection to the Atlanta offenses, it is not at all clear that even an exhaustive voir dire would succeed in removing everyone who had a preconception of the defendant's guilt of the Atlanta offenses. If persons with such notions remained on Mr. Rudolph's jury, and the requested discovery

substantiated that the Atlanta accusations were false, it would be inconceivable that competent counsel would not use that evidence not only to remove perceived jury prejudice, but also and more importantly, to establish Mr. Rudolph's innocence of the Birmingham offenses.

The magistrate did acknowledge the argument that the discovery could be used to establish Mr. Rudolph's innocence of the Birmingham offenses, but he erroneously rejected the argument on the ground that since the government would not rely on the Atlanta offenses, "the defendant would have nothing to attack" and "[t]he defense of the Birmingham bombing could not rest on refuting a similarity to the Atlanta bombings the government never attempts to prove." (Doc. 322, Magistrate's order at 5). The defendant is not seeking to "attack" a theory not put forward but to affirmatively utilize a theory that is implicit in the Atlanta and Birmingham indictments: namely, that one person committed all of the offenses. If the government's theory is correct, and if the forensic evidence underlying the Atlanta charges points away from Mr. Rudolph and toward someone else, the requested discovery is material to the Birmingham offenses by any standard.

The second justification put forward was that, in its notice of intent to seek the death penalty, the government had alleged as a non-statutory aggravating factor that "[t]he Defendant, ERIC ROBERT RUDOLPH, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others." The government had specified in the notice that it only intends to rely on the Birmingham offenses and the vague allegations of lack of rehabilitative potential and lack of remorse to support an argument of future dangerousness. The *Reply* argued that "(t)he Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness" *Simmons v. South Carolina*, 512 U. S. 154, 166 n. 5 (1994). See also, *Skipper v. South Carolina*, 476 U.S. 1, 5 n. 1 (1986) (where the prosecution relies on a prediction

of future dangerousness in requesting the death penalty, elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) ( “We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain”); *United States v. Johnson*, 223 F.3d 665, 674-675 (7<sup>th</sup> Cir. 2000) (“the defendant was of course entitled to counter the government's evidence that he would be a continued menace to society while in prison, that being evidence offered to establish an aggravating factor”).

The *Reply* also argued that relevant evidence in rebuttal to an allegation of future dangerousness must include forensic and other evidence indicating that the defendant has no history of other criminal activity. The *Reply* pointed out that all experts on the topic of future dangerousness agree that “ [p]revious instances of violent behavior are an important indicator of future violent tendencies.” *Heller v. Doe by Doe*, 509 U.S. 312, 323 (1993) (collecting scientific literature). The opposite is also true. The lack of previous instances of violence is an important indicator of future non-violence. The *Reply* specifically alleged that “(b)y exploring the weaknesses in the government’s forensic evidence allegedly connecting him to the Atlanta offenses, the defense hopes to build a solid foundation for an expert opinion that for a variety of reasons, including most importantly his lack of prior criminal history, Mr. Rudolph will not pose a future danger to anyone. See, Hanson v. State, 72 P. 3d 40 (Okla. Crim. App. 2003) ( “The State alleged that Hanson would probably continue to commit acts of violence posing a continuing threat to society. Hanson had a constitutional right to rebut that allegation by presenting expert evidence regarding his future dangerousness.”)

The magistrate rejected this justification, reasoning that since the government has represented that it will not rely at all on the Atlanta bombing evidence to prove future

dangerousness, “[T]he defendant will have nothing to refute” and “[h]is non-involvement in the Atlanta bombings would have no more evidentiary relevance than his non-involvement in the Kennedy Assassination or the Great Train Robbery or any of thousands of other crimes in which the Government will not attempt to implicate the defendant.” (Doc. 322, Magistrate’s Order at 6) However, Mr. Rudolph is not formally charged with the Kennedy Assassination or the Great Train Robbery. He has been charged, with much fanfare and public relations gimmickry with the Atlanta offenses and a large percentage of the public, thanks to the government’s media campaign, believe him guilty of those charges. In these circumstances, any expert prediction of future non-dangerousness which did not attempt to access his innocence of the Atlanta offenses would be foolhardy. Again, “[t]he Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution’s arguments of future dangerousness.” *Simmons v. South Carolina*, 512 U. S. 154, 166 n. 5 (1994).

The third and perhaps most important justification for the requested discovery was completely ignored by the magistrate. The reply argued that regardless of the government’s allegation of future dangerousness, at the penalty phase, the defense is entitled to prove as an independent mitigating factor under 18 U.S. C. Section 3592 (a)(5) that he does “not have a significant prior history of other criminal conduct.” The Reply also argued that consideration of this factor is also compelled under the Eighth Amendment. As one court put it, “[t]he absence of ... violent criminal activity ... [is a] significant mitigating circumstanc[e] in a capital case, where the accused frequently has an extensive criminal past.” *People v. Crandall* (1988) 46 Cal.3d 833, 884. See also, *Siripongs v. Calderon*, 35 F.3d 1308, 1323 (9th Cir. 1994) (In ordering an evidentiary hearing on a claim of ineffective assistance of counsel, the court commented that “[o]f particular relevance may be counsel’s failure to request an instruction that the defendant had no prior violent criminal record.”) ; *Aldridge v. Dugger*, 925 F.2d 1320, 1330

(11th Cir. 1991) (fact defendant had no previous convictions for violent crime was a valid mitigating factor).

The *Reply* pointed out that in *Lashley v. Armontrout*, 957 F.2d 1495 (8th Cir. 1992), the Eighth Circuit agreed that the state trial court violated the Eighth Amendment by refusing to give the mitigating-circumstance instruction defendant requested - i.e., "The defendant has no significant history of prior criminal activity." *Id.* at 1501. Importantly, the federal court found reversible error even though the defendant had not come forward with proof of the negative facts supporting the instruction. The Court concluded that "*Lockett* requires the State - which is in a peculiarly advantageous position to show a significant prior criminal history ... to come forward with evidence, or else the court must tell the jury it may consider the requested mitigating circumstance." *Id.* at 1502.

However, the decision in *Lashley v. Armontrout*, 957 F.2d 1495 (8th Cir. 1993) was overruled by the Supreme Court in *Delo v. Lashley* (1993) 507 U.S. 272, 113 S.Ct. 1222. The Court concluded,

"Today we make explicit the clear implication of our precedents: Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support them. Because the jury heard no evidence concerning Lashley's prior criminal history, the trial judge did not err in refusing to give the requested instruction."

*Id.* at 277.

The *Reply* argued that under *Delo*, in order for the defendant to take advantage of the significant mitigating factor of no prior criminal history, the defendant must come forward with proof that he committed no prior offenses. As stated in *Delo*, the Supreme Court has "never ... suggested that the Constitution requires a ... trial court to instruct the jury on mitigating circumstances in the absence of any supporting evidence" and the government "may require the defendant to bear the risk of nonpersuasion as to the existence of mitigating circumstances." *Id.*

at 276. internal quotations omitted). See also, *Hill v. Moore*, 175 F. 3d 915, 918 n. 19 (11<sup>th</sup> Cir 1994) (“In capital cases, the Constitution requires the trial courts to charge the jury on a statutory mitigating circumstance only if the evidence so warrants.”) The reply concluded that “Mr. Rudolph cannot be expected to discharge this burden in this case unless he is given access to those items requested in his motion which the government has essentially conceded are necessary to a full and fair investigation of the *charged* crime. The same information must also be necessary to a full and fair investigation of uncharged crimes whose absence the defendant must prove in order to establish the compelling mitigating factor of a lack of a significant prior history of other criminal conduct.”

Because the magistrate did not address this justification for the discovery, and because this justification standing alone or in combination with the other two justifications is sufficient to compel the requested discovery, the Magistrate’s Order should be reversed and the requested discovery should be granted.

## CONCLUSION

WHEREFORE, for any or all of the foregoing reasons, Mr. Rudolph requests this Court to enter an order reversing the magistrate's order and granting his motion for discovery as it relates to the Atlanta offenses.

Respectfully submitted,  
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Dated: September 21, 2004

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## CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for the government the defendant's Appeal properly addressed and first class postage prepaid, and by placing a copy in the United States Mail,

Michael W. Whisonant  
Robert J. McLean  
Will Chambers  
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This the 21<sup>st</sup> day of September, 2004.



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Bill Bowen